

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**MFA, INC.,
APPELLANT**

vs.

**HLW BUILDERS, INC.,
RESPONDENT**

DOCKET NUMBER WD70475

DATE: FEBRUARY 23, 2010

Appeal from:

Callaway County Circuit Court
The Honorable Mary “Jodie” Capshaw Asel, Judge

Appellate Judges:

Division Two: Joseph M. Ellis, P.J., Victor C. Howard and Cynthia L. Martin, JJ.

Attorneys:

Theodore Kardis, for Appellant

Christopher L. Heigele, for Respondent

MISSOURI APPELLATE COURT OPINION SUMMARY

MISSOURI COURT OF APPEALS WESTERN DISTRICT

MFA, INC., APPELLANT

v.

HLW BUILDERS, INC., RESPONDENT

WD70475

Callaway County, Missouri

Before Division Two Judges: Joseph M. Ellis, P.J., Victor C. Howard and Cynthia L. Martin, JJ.

MFA, Inc. appeals from a summary judgment entered in the Circuit Court of Callaway County in favor of HLW Builders, Inc. in an action filed by MFA to compel arbitration or, in the alternative, for breach of contract. MFA sought indemnification for the amount it paid to settle a wrongful death action stemming from a fatal accident occurring at one of MFA's agriculture chemical/fertilizer facility that had been constructed by HLW.

AFFIRMED.

Division Two holds:

- (1) Where the arbitration agreement provided that "should any disputes arise under this Contract that cannot be otherwise peacefully agreed upon, the same may be submitted to arbitration upon the written request of either party," the use of the word "may" gave either party the right to pursue arbitration if it so desired and arbitration was mandatory upon request. The trial court erred in concluding to the contrary.
- (2) MFA acted inconsistently with its right to arbitrate by filing its third party action against HLW, waiting nineteen months to dismiss its action, and not notifying HLW of its intent to pursue arbitration until after HLW had prevailed in its summary judgment motion against the wrongful death plaintiff. Such actions were clearly indicative of its desire to adjudicate the issues in circuit court rather than submit them to arbitration.
- (3) Where MFA waited nineteen months before asserting its contractual right to arbitrate, pursued legal remedy in circuit court, and HLW incurred legal expenses defending that action, prejudice was sufficiently established.
- (4) The trial court did not err in concluding that MFA had waived its right to arbitrate where the record established that MFA had knowledge of that right, acted inconsistently with that right, and HLW was prejudiced.
- (5) MFA failed to sufficiently develop its claim that summary judgment was improperly granted on its claim for specific performance where it failed to

- identify what facts it claimed remained in dispute. The claim was therefore waived.
- (6) This Court need not address MFA's final claim that the trial court erred in granting summary judgment to HLW on MFA's breach of contract claim based upon the acceptance doctrine because HLW has not challenged the trial court's alternative ground for granting summary judgment based upon its finding that, under the uncontroverted facts, HLW did not breach the contract with MFA.

Opinion by: Joseph M. Ellis, Judge

Date: February 23, 2010

This summary is *UNOFFICIAL* and should not be quoted or cited.